



The Board has considered the record and adopted the stipulations listed in the Award. In addition, the Board has considered the stipulation filed with the Division on March 30, 2012, concerning documentation of payments of temporary total disability benefits.

### ISSUES

Respondent paid a total of \$15,289.98 in temporary total disability compensation, which, at a compensation rate of \$391.16, computes to a total of 39.1 weeks.<sup>2</sup> Respondent agrees that claimant was entitled to 5 weeks of temporary total disability compensation but is asking for a credit for the remaining weeks paid.

Claimant argues respondent is not entitled to a credit for overpayment of temporary total disability compensation for any weeks in which claimant had restrictions related to his injury. Claimant is asking that the ALJ's Award be affirmed.

The issue for the Board's review is: Is respondent entitled to a credit for overpayment of temporary total disability compensation? If so, for how many weeks?

### FINDINGS OF FACT

Claimant was injured on February 24, 2010, when he slipped on some ice on a step at work. He reached out for the railing with his left hand and tried to brace himself with his right hand. He fell onto his right side and suffered a large bruise on his right hip and ankle and injured his right shoulder. Claimant reported his injury to respondent and was provided medical treatment. He did not miss any work because of the injury. Claimant testified that his work at respondent was almost all work at the computer and he did not do a lot of lifting at his job. Therefore, he had no real need for accommodations.

Claimant was referred to Dr. Chris Fevurly by respondent and was initially seen on March 22, 2010, and again on April 12, 2010. After both of those visits, Dr. Fevurly allowed claimant to return to his regular job and did not issue any restrictions.

Claimant was terminated from his employment by respondent on May 26, 2010, for timecard fraud. Claimant admitted that his wife, who also worked at respondent, had clocked in at work for him several times in April and May 2010. Claimant said his wife was taking a class at Kansas University, and he would typically pick her up at school and they would go directly to work. Normally they would be close on time. Claimant said that because of his difficulty getting around because of his injury, he would drop off his wife and she would clock in for claimant so that he would not be late. Claimant said the bruise on

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<sup>2</sup> Respondent paid 5 weeks TTD at the rate of \$354 per week and the rest at the rate of \$391.09 per week. The ALJ computed the award using a compensation rate of \$391.09.

his right leg was somewhat debilitating and that he also had a back injury for which he had been seeing a chiropractor.<sup>3</sup> When claimant's wife clocked in for him, it bought him a couple minutes that would keep him from being tardy.

Claimant's last visit with Dr. Fevurly before his termination was April 12, 2010. He had a follow-up appointment scheduled for sometime in June 2010, but he cancelled that appointment and then also the rescheduled appointment because he was under the mistaken impression that because of his termination, he would have to start paying for his medical treatment. After it was explained to claimant that workers compensation insurance would continue to pay for the treatment on his right shoulder, claimant returned to see Dr. Fevurly on July 12, 2010. At that time, Dr. Fevurly placed claimant on modified work with restrictions that he perform no overhead lifting or reaching with his right arm and was to limit forceful pushing and pulling with his right arm. Dr. Fevurly saw claimant again on August 2, 2010. He again placed claimant on modified duty and restricted claimant to no overhead lifting or reaching with his right arm.

Claimant was later referred to Dr. Douglass Stull, an orthopedic surgeon, whom he first saw on October 12, 2010. Dr. Stull also placed claimant on modified work with a restriction of no overhead lifting or reaching with his right arm.

On November 8, 2010, claimant went to work at one of the dining halls at Kansas University.

Claimant underwent surgery on his right shoulder on February 3, 2011, performed by Dr. Stull. Dr. Stull kept claimant off work through March 8, 2011. Thereafter, claimant was given temporary restrictions that he not lift more than 5 pounds or perform overhead lifting or reaching with his right arm. Kansas University was unable to accommodate claimant's restrictions, and claimant was unable to work. Dr. Stull last saw claimant on June 2, 2011, at which time claimant was released to full duty with no permanent restrictions.

On October 3, 2011, claimant was evaluated by Dr. Peter Bieri at the request of claimant's attorney. Dr. Bieri noted that claimant had been released without formal restrictions, which Dr. Bieri found to be reasonable and appropriate.

Respondent has paid temporary total disability benefits to claimant from May 27, 2010, through November 7, 2010, in the amount of \$9,217.99; from February 3, 2011, through March 9, 2011, in the amount of \$1,770, and from March 3, 2011, through May 18, 2011, in the amount of \$4,301.99. Using the correct compensation rate of \$391.16, respondent has paid a total of 39.1 weeks temporary total disability benefits. It argues it

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<sup>3</sup> Dr. Fevurly's April 12, 2010, medical note indicates that claimant reported himself to be free of pain in his right leg and low back at that time. P.H. Trans., Resp. Ex. A at 7.

is entitled to a credit for all temporary total disability benefits paid except for the 4.86 week period from February 3, 2011, through March 8, 2011, when claimant was off work after his surgery, because claimant was capable of engaging in substantial, gainful employment.

#### PRINCIPLES OF LAW

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

K.S.A. 44-510c(b)(2) states:

Temporary total disability exists when the employee, on account of the injury, has been rendered completely and temporarily incapable of engaging in any type of substantial and gainful employment. A release issued by a health care provider with temporary medical limitations for an employee may or may not be determinative of the employee's actual ability to be engaged in any type of substantial and gainful employment, except that temporary total disability compensation shall not be awarded unless the opinion of the authorized treating health care provider is shown to be based on an assessment of the employee's actual job duties with the employer, with or without accommodation.

K.S.A. 44-525(c) states:

In the event the employee has been overpaid temporary total disability benefits as described in subsection (b) of K.S.A. 44-534a, and amendments thereto, and the employee is entitled to additional disability benefits, the administrative law judge shall provide for the application of a credit against such benefits. The credit shall first be applied to the final week of any such additional disability benefit award and then to each preceding week until the credit is exhausted.

K.S.A. 44-534a(b) states:

If compensation in the form of medical benefits or temporary total disability benefits has been paid by the employer or the employer's insurance carrier either voluntarily or pursuant to an award entered under this section and, upon a full hearing on the claim, the amount of compensation to which the employee is entitled is found to be less than the amount of compensation paid or is totally disallowed, the employer and the employer's insurance carrier shall be reimbursed from the workers compensation fund established in K.S.A. 44-566a and amendments thereto, for all amounts of compensation so paid which are in excess of the amount

of compensation the employee is entitled to less any amount deducted from additional disability benefits due the employee pursuant to subsection (c) of K.S.A. 44-525, and amendments thereto, as determined in the full hearing on the claim. The director shall determine the amount of compensation paid by the employer or insurance carrier which is to be reimbursed under this subsection, and the director shall certify to the commissioner of insurance the amount so determined. Upon receipt of such certification, the commissioner of insurance shall cause payment to be made to the employer or the employer's insurance carrier in accordance therewith. No reimbursement shall be certified unless the request is made by the employer or employer's insurance carrier within one year of the final award.

### ANALYSIS

The Board agrees with the ALJ's analysis with respect to the absence of any good faith requirement in order to receive temporary total disability compensation. K.S.A. 44-510c(b)(2) provides that in order to be eligible to receive temporary total disability compensation, claimant, on account of the injury, must have been rendered "completely and temporarily incapable of engaging in *any type* of substantial and gainful employment." (Emphasis added.) It does not say that claimant must be rendered incapable of returning to the actual job he was performing on the date of accident or at the time claimant is terminated from employment. The type of job claimant was performing and reason for the termination do not matter. What matters, once claimant was terminated by respondent, was what jobs, if any, was claimant capable of performing in the open labor market within the restrictions he was given. The Board agrees with the ALJ that claimant's restrictions were "on account of the injury" and so that portion of the statute has been satisfied. The reason for claimant's termination from employment, whether it was for cause or due to bad faith, simply does not matter. Nevertheless, with the exception of the period of time claimant was taken completely off work following his surgery, claimant has failed to prove that his temporary restrictions precluded him from engaging in substantial, gainful employment in the open labor market.

### CONCLUSION

The Board finds that claimant is entitled to temporary total disability compensation from February 3, 2011, through March 8, 2011, a period of 4.86 weeks.

### AWARD

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated May 10, 2012, is modified to find:

Claimant is entitled to 4.86 weeks of temporary total disability compensation at the rate of \$391.16 per week in the amount of \$1,901.04 followed by 20.91 weeks of permanent partial disability compensation, at the rate of \$391.16 per week, in the amount

of \$8,179.16 for a 9.5 percent loss of use of the right shoulder, making a total award of \$10,080.20.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of October, 2012.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

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Brad E. Avery, Administrative Law Judge